Dismissal under s. 190F(6)—failed merit conditions of registration test

Hunter on behalf of Wiri People No 2 v Queensland [2009] FCA 325

Logan J, 27 March 2009

Issue
The issue in this case was whether the court, of its own motion, should dismiss the Wiri People No 2 claimant application pursuant to s. 190F(6) of the *Native Title Act 1993* (Cwlth) (NTA).

Background
A delegate of the native title registrar found that the claim made in the application did not meet all of the conditions of the registration test. An application for review of that decision was dismissed. On 26 May 2008, the court ordered the applicant show cause why the application should not be dismissed pursuant to s. 190F(6). The applicant's solicitors had withdrawn prior to the directions hearing and there was no appearance by, or on behalf of, the applicant at that hearing. Justice Logan then ordered (among other things) that the applicant show cause why the application should not be dismissed pursuant to s. 84D for want of authorisation—at [2].

Dismissal under s. 190F(6)
Subject to the conditions in s. 190F(5) being met, s. 190F(6) provides that the court may, of its own motion or on the application of a party, dismiss a claimant application if:

- the court is satisfied that the application in issue has not been amended since consideration by the Registrar, and is not likely to be amended in a way that would lead to a different outcome once considered by the Registrar; and
- in the opinion of the court, there is no other reason why the application in issue should not be dismissed.

Subsection 190F(5) provides that s. 190F(6) applies if:

- in the Native Title Registrar's opinion, the claim made in the application does not satisfy all of the merit conditions found in s. 190B or it is not possible to determine whether all of those conditions are met because of a failure to meet all of the conditions found in s. 190C; and
- the court is satisfied that all avenues for judicial review or reconsideration by the National Native Title Tribunal have been exhausted without the claim being registered.

His Honour referred to his exposition of the background to s. 190F(6) in *George v Queensland* [2008] FCA 1518 (summarised in *Native Title Hot Spots* Issue 29)—at [4].

In Logan J's view:

> The long and the short of it is, the application is one which has failed a registration test. Every opportunity has been given for the Applicants to amend the application or at least provide some hope, in a meaningful way, that an amendment is likely which would provide a basis for retention of the case in the Court's list. There is no basis for forming an opinion that this is anything other than a case which does not warrant the further expenditure of public funds in terms of judicial time and also in terms of the investment of public funds in a Respondent State considering the case and attending. There are bases then upon which the application may be dismissed and should be dismissed under s 190F(6)—at [4].

Comment

It should be noted that the Wiri People No 2 claim satisfied *all* of the conditions found in s. 190B. (It failed only on the condition found in s. 190C relating to authorisation.) Therefore, it would seem (with respect) that the court was not empowered the dismiss the application under s. 190F(6) because one of the pre-conditions for the exercise that power was not satisfied, i.e. s. 190F(5)(a)(i), which provides that s. 190F(6) only applies if the claim 'does not satisfy all of the conditions of s. 190B'. However, in this case, it is of no moment because the court also relied upon default as a ground for dismissal.

Dismissal for default of appearance

It was found that there was another basis 'which ought not be forgotten' upon which this application should be dismissed, i.e. default of appearance. In this case, there had been multiple defaults—at [5].

While finding it 'understandable' that the State of Queensland may have reasons for not moving for dismissal under s. 190F(6), his Honour was of the view that this did not apply where the practice and procedure of the court had not been observed:

> In the ordinary course of events, one might expect a respondent, particularly a public respondent, acting responsibly to move for dismissal in a case where there is an event of default in the ordinary practice and procedure of a court, as a model litigant would move in other cases involving the wider interests of the public. Be that as it may, there is then a basis in terms of default under the practice of the court as well as under s. 190F(6), for the dismissal of this application—at [6].

Decision

The application was dismissed for default under the practice of the court as well as under s. 190F(6).